MOTION FILED
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No. 10-548

In the

Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC.,
AND MINE RECLAMATION CORPORATION,
Petitioners,

v.

NATIONAL PARKS &
CONSERVATION ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS KAISER EAGLE MOUNTAIN, INC., AND MINE RECLAMATION CORPORATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37(2), Pacific Legal Foundation respectfully moves this Court for leave to file an *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed by Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation (Kaiser).

Counsel of record for all parties received the Foundation's notice of intent to file a brief *amicus curiae* at least ten days prior to the brief's filing. Counsel for Petitioners Kaiser, Respondents United States Department of the Interior, *et al.*, and Respondent National Parks and Conservation Association have consented in writing to this filing. Consent letters have been lodged with the Clerk of this Court.

Counsel for Respondents Donna Charpied, *et al.*, did not respond to Pacific Legal Foundation's repeated requests for consent to file. Pacific Legal Foundation, therefore, respectfully submits this motion for leave to file the attached *amicus curiae* brief.

Pacific Legal Foundation respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

DATED: November, 2010.

Respectfully submitted,

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QUESTION PRESENTED

Does a court err by vacating an agency's action and remanding for further administrative proceedings that will have no effect on the agency's decision or serve any other substantive purpose?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation is a nonprofit, public interest organization that provides a voice in the courts for Americans who believe in limited government, private property rights, and individual freedom. Thousands of individuals, organizations, and associations support the Foundation's efforts nationwide.

In this case, the Ninth Circuit has determined that a federal agency may not take into account the objectives of a private applicant when considering alternatives for a joint federal-private project under the National Environmental Policy Act (NEPA). This crabbed reading of the Act raises an important question about the scope of environmental review under federal law and adds to a split among the circuits. Resolution of this conflict would further the public interest.

Pacific Legal Foundation participated as *amicus curiae* in support of Kaiser's petition for rehearing *en banc* below and has participated in many Supreme

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[1] Counsel of record for all parties received the Foundation's notice of intent to file a brief *amicus curiae* at least ten days prior to the brief's filing. Counsel for Petitioners Kaiser, Respondents United States Department of the Interior, *et al.*, and Respondent National Parks and Conservation Association have consented in writing to this filing. Consent letters have been lodged with the Clerk of this Court.

Counsel for Respondents Donna Charpied, *et al.*, did not respond to Pacific Legal Foundation's repeated requests for consent to file.

No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person or entity, other than Amicus, made a monetary contribution to its preparation.

Court cases involving NEPA. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983).

The Foundation's *amicus curiae* brief in this case emphasizes the significant conflict over the requirements of a NEPA purpose and need statement that exists between the Ninth Circuit's decision below and a similar decision from the Seventh Circuit and contrary decisions from the D.C. Circuit and Tenth Circuit. This conflict is described in detail in Pacific Legal Foundation's amicus curiae brief and provides a compelling reason for this Court to grant Kaiser's Petition for a Writ of Certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is typical of the "result-oriented" decisions from the Ninth Circuit with which this Court is all too familiar. *See National Parks & Conservation Ass'n v. United States Dept. of Interior*, 606 F.3d 1058, 1079 (9th Cir. 2010) (Trott, J., dissenting) (criticizing the "result-oriented notion" that the Bureau of Land Management's purpose and need statement is "narrowly drawn" as "utterly wrong"). In *National Parks*, the Ninth Circuit invalidated the Bureau of Land Management's (Bureau) NEPA analysis of a vitally important land exchange between the Bureau and Kaiser. The land exchange is necessary to address a " 'critical' landfill capacity shortfall in Southern California" and would lead to the development of "'one of the world's safest landfills and a model for others to emulate.' " *Id.* at 1079, 1099 (internal citations omitted).

The Ninth Circuit's decision, however, overturns decades of work on this project by Kaiser, local governments, and federal agencies. Under the Ninth Circuit's decision, NEPA has effectively become something much more than a procedural statute–the court in this case has forced the parties to "hit[] the reset button . . . unnecessarily sending [them] back to a Sisyphean hill which cannot be climbed in a lifetime." *Id.* at 1078. (Trott, J., dissenting).

Indeed, the "final irony" of the Ninth Circuit's decision is that the court has sent this case "back to the Bureau of Land Management . . . to do something [it] has already adequately done: consider the value of the land involved as a commercial landfill." *Id.* at 1075. (Trott, J., dissenting). The Ninth Circuit's decision warrants review because the court has unnecessarily remanded the case to the Bureau for further, but needless, consideration. *See* Petitioners Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation's Petition for Writ of Certiorari at 18.

The underlying problems on the merits of the *National Parks* decision, however, cannot be ignored. The Ninth Circuit determined that the Bureau's NEPA analysis was deficient because the agency's Environmental Impact Statement acknowledged the goals of Kaiser in proposing the land exchange to the Bureau. *See National Parks*, 606 F.3d at 1070-72 (majority opinion). But nothing in NEPA or its implementing regulations forecloses an agency from recognizing non-federal objectives in considering the purpose and need for the proposed action. *See* 42 U.S.C. § 4332(2)(C)(iii) (An Environmental Impact Statement must discuss "alternatives to the proposed action."), *and* 40 C.F.R. § 1502.13 (An Environmental

Impact Statement "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.").

To the contrary, such a consideration is required. As Judge Trott cogently noted in dissent, "[o]f course BLM acknowledged Kaiser's purpose – *the law requires BLM to do so*! For private, non-federal proposals, '[a]gencies . . . are precluded from completely ignoring a private applicant's objectives.'" *National Parks*, at 1079 (Trott, J. Dissenting) (brackets and ellipses in original dissent) (quoting *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999), and citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991)).

The Ninth Circuit's decision in *National Parks* also conflicts with D.C. Circuit and Tenth Circuit case law regarding how an agency must write a NEPA purpose and need statement "in a setting where a private entity approaches a government entity with a joint proposal that will benefit both." *National Parks*, 606 F.3d at 1078 (Trott, J. dissenting). *See Dombeck*, 185 F.3d at 1175 ("Agencies . . . are precluded from ignoring a private applicant's objectives.") (citing *Burlington*, 938 F.2d at 196). The Ninth Circuit has joined the Seventh Circuit in effectively precluding an agency from taking into account the "'means by which a particular applicant can reach his goals'" in pursuing a project requiring federal approval. *See Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997) (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 636 (7th Cir. 1986) and contrasting *Burlington*, 938 F.2d at 198-99).

Given this conflict, the adverse ramifications the Ninth Circuit's decision will have in this case, and the uncertainty the decision will cause for cooperative projects between federal and non-federal parties throughout the country, this Court should grant Kaiser's petition.

I

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THIS CASE INVOLVES A CIRCUIT CONFLICT OVER AN IMPORTANT FEDERAL QUESTION ABOUT THE SCOPE OF NEPA IN DEFINING PROJECT OBJECTIVES

NEPA requires agencies to prepare Environmental Impact Statements for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An Environmental Impact Statement must include a discussion of "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). Although "the term 'alternatives' is not self-defining," this Court has held that a "'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man," and that "[t]ime and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978). Moreover, the courts of appeals uniformly recognize "the harm that an unbounded understanding of alternatives might

cause." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). *See also City of Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) ("The Environmental Impact Statement need not consider an infinite range of alternatives, only reasonable or feasible ones.") (citing 40 C.F.R. § 1502.14(a)-(C)).

Agencies are also obligated to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives," but the courts disagree as to how an agency may ensure a finite range of alternatives to an agency action through a purpose and need statement. *See* 40 C.F.R. § 1502.13. There is indeed a "conflict of how to construe the stated project purpose under NEPA" when the impetus behind the project is the proposal of a non-federal applicant. *See* Jason J. Czarnezki, Comment, *Defining the Project Purpose under NEPA: Promoting Consideration of Viable EIS Alternatives*, 70 U. Colo. L. Rev. 599, 619 (2003).

The D.C. Circuit holds that an agency may "delimit the universe of the action's reasonable alternatives" by "consider[ing] an applicant's wants when the agency formulates the goals of its own proposed action." *Burlington*, 938 F.2d at 195, 199. The Tenth Circuit likewise holds that agencies "are precluded from completely ignoring a private applicant's objectives." *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) (citing *Citizens Against Burlington*, 938 F.2d at 196). *See also Louisiana Wildlife Fed'n v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985) (*per curiam*) ("[The] contention, that the alternatives may not be viewed with the applicant's

objectives in mind, is not substantiated by either case law or the applicable regulations.").

However, an agency's consideration of a non-federal applicant's objectives in a NEPA purpose and need statement "is a losing position in the Seventh Circuit," which holds that an agency "cannot restrict its analysis to those 'alternative means by which a particular applicant can reach his goals.'" *Simmons*, 120 F.3d at 669 (quoting *Van Abbema*, 807 F.2d at 638 and contrasting *Burlington*, 938 F.2d at 198-99). According to the Seventh Circuit, consideration of non-federal objectives is foreclosed in a purpose and need statement because "the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals." *Van Abbema*, 807 F.2d at 638.

The Ninth Circuit in this case joined the Seventh Circuit by prohibiting purpose and need statements that "exclude[] alternatives that fail to meet specific private objectives." *National Parks*, 606 F.3d at 1072. This rule of law is in direct conflict with then-Judge Thomas' admonition in *Burlington* that an agency's purpose and need statement is "shaped by the application at issue" and that "Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action." *Burlington*, 938 F.2d at 199. The conflict over an agency's duty to consider the objectives of a non-federal applicant in a NEPA purpose and need statement is explained in greater detail below and warrants review by this Court.

A. Contrary to the Seventh and Ninth Circuits, the D.C. Circuit and Tenth Circuit Permit Agencies to Consider Non-federal Objectives in a Purpose and Need Statement

In *Burlington*, the D.C. Circuit considered whether the Federal Aviation Administration's (FAA) stated objectives for an airport expansion in Toledo were reasonable. *Burlington*, 938 F.2d at 193-99. The expansion plan involved the FAA, the Toledo-Lucas County Port Authority (Port Authority), and Burlington Air Express, Inc., a private company that intended to relocate to Toledo pending the Port Authority's accommodation of its operations. *Id.* at 192.

As an initial matter, the court concisely summarized the role agencies play in ensuring that environmental impact statements do not "wither into 'frivolous boilerplate' " by discussing a vast array of "[f]ree-floating 'alternatives' to the proposal for federal action." *Burlington*, 938 F.2d at 195 (quoting *Vermont Yankee*, 435 U.S. at 551). The court remarked that an alternative is reasonable and must be discussed "only if it will bring about the ends of the federal action." *Burlington*, 938 F.2d at 195. Thus, the goals of the federal action, as set forth in the purpose and need statement, "delimit the universe of the action's reasonable alternatives." *Id.*

The court next confirmed the primary role agencies have both in discussing the alternatives and defining the goals which limit the discussion of alternatives: "We have held before that an agency bears the responsibility for deciding which alternatives to consider in an environmental impact statement. . . .

It follows that an agency thus bears the responsibility for defining at the outset the objectives of an action." *Id.* at 195-96 (citations omitted). The court further explained that an agency's definition of objectives is to be upheld "so long as the objectives that the agency chooses are reasonable," just as courts uphold an agency's discussion of alternatives "so long as the alternatives are reasonable and the agency discusses them in reasonable detail." *Id.* at 196.

Under this deferential standard, "an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Id.* (citation omitted). But "[n]or may an agency frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities." *Id.*

An agency ensures that its stated goal in a NEPA action is neither unreasonably narrow nor unreasonably broad by "look[ing] hard at the factors relevant to the definition of purpose." *Id.* In other words, "[w]hen an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application," as well as the views of Congress as expressed in statutory mandates. *Id.* (citing 40 C.F.R. § 1508.18(b)(4); *Louisiana Wildlife Fed'n v. York*, 761 F.2d at 1048; and *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1046-47 (1st Cir. 1982)).

With these principles in mind, the D.C. Circuit upheld the FAA's purpose and need statement and

explained why it was appropriate to consider the interests of the Port Authority and Burlington Air Express, not simply those of the FAA. The court emphasized the agency's narrow statutory mandate, which is to "nurture aspiring cargo hubs," not to "determine the siting of the nation's airports." *Burlington*, 938 F.2d at 197 (citing 49 U.S.C. APP. § 2201(a)(7), (11)) (other citations omitted). Congress wanted the FAA to "facilitate the development of and enhancement of such airports," but left the precise manner of accomplishing this mandate to the discretion of the agency. *See id.* at 197 n.5 (quoting 49 U.S.C. APP. § 2201(a)). Thus, the FAA was entitled to look beyond its administrative capacity in defining the goals of the agency's action. The agency validly "took into account the Port Authority's reasons for wanting a cargo hub in Toledo," including the Authority's expectations that the cargo hub would create hundreds of full and part-time jobs and that "the expanded airport, and Burlington's presence there, [would] attract other companies to Toledo." *Burlington*, at 197-98.

Under its deferential approach to agency action under NEPA, the court upheld FAA's purpose and need statement: "Having thought hard about" the federal and non-federal factors put before the agency, "the FAA defined the goal for its action as helping to launch a new cargo hub in Toledo and thereby helping to fuel the Toledo economy," and "evaluated the environmental impacts of the only proposal that might reasonably accomplish that goal—approving the construction and operation of a cargo hub at Toledo Express. It did so with the thoroughness required by law." *Id.* at 198 (citation omitted).

Importantly, the court also rejected the argument that the FAA should have considered other ways in which Burlington Air Express could have built a permanent cargo hub, noting that "Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be." *Id.* at 199. The FAA was not required to "canvass the business choices that Burlington faced when it considered leaving Fort Wayne" because federal agencies have "neither the expertise nor the proper incentive structure to do so (it has no shareholders who would suffer from mistaken judgments)." *Id.* at 197 n.6.

Indeed, the court was not permitted to excise the agency's consideration of the Port Authority's and Burlington's needs: "We are forbidden from taking sides in the debate over the merits of developing the Toledo Express Airport; we are required instead only to confirm that the FAA has fulfilled its statutory obligations. . . . All that this court decides today is that the judgment was not uninformed." *Id.* at 199 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)).

The Tenth Circuit followed the D.C. Circuit in *Dombeck*, holding that "agencies . . . are precluded from completely ignoring a private applicant's goals." *Dombeck*, 185 F.3d at 1175 (citing *Burlington*, 938 F.2d at 196). In *Dombeck*, Vail, a private company, proposed to expand its existing ski area into a part of the White River National Forest known as Category III. *See Dombeck*, 185 F.3d at 1165-66. Pursuant to its authority over national forests, the Forest Service

approved Vail's site-specific plan and completed a NEPA review of the proposed expansion's environmental impacts. *See id.* at 1166. However, after the NEPA review was completed, one individual and various groups sued the Forest Service, claiming that the agency "blindly adopted Vail's articulated purpose and need" for the expansion project. *Id.* at 1175.

The Tenth Circuit rejected the plaintiffs' claim, holding that agencies are required to "take responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes." *Id.* Under this deferential approach, the Forest Service was well within its discretion to consider "the White River Forest Plan, prior Forest Service planning and permitting decisions in accordance with the National Forest Ski Area Permit Act of 1986, *and Vail's expressed needs and goals*, when drafting the statement of purpose and need for the Category III expansion environmental impact statement." *Id.* (emphasis added).

Thus, the rule in *Burlington* and *Dombeck* is that, where a project involves private parties, federal agencies are not only permitted but required to consider a mix of public and private goals in a purpose and need statement. Because NEPA "does not substantively constrain an agency's choice of objectives; to the contrary, it is those very objectives that provide the point of reference for a determination whether an alternative is 'reasonable' in the first place." *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999). These decisions provide agencies with a necessary means to " 'delimit the universe of the

action's reasonable alternatives'" and are in line with a court's obligation to review "whether an agency's objectives are reasonable, and whether a particular alternative is reasonable in light of these objectives . . . with considerable deference to the agency's expertise and policy-making role." *Id.*

B. Contrary to the D.C. and Tenth Circuits, the Ninth Circuit Joined the Seventh Circuit in Erroneously Removing the Discretion of Federal Agencies To Consider a Mix of Federal and Non-federal Goals in a Purpose and Need Statement

The Ninth Circuit in this case was satisfied that the Bureau's purpose and need statement included an "unquestionably . . . valid BLM purpose": the need to meet long-term landfill demand. *National Parks*, 606 F.3d at 1071. It likewise noted that "[o]ther circuits have held that agencies must acknowledge private goals." *Id.* at 1070 (citing *Burlington*, 938 F.2d at 196, and *Dombeck*, 185 F.3d at 1175). However, in a sharp contrast to *Burlington* and *Dombeck*'s approval of an agency's consideration of non-federal objectives, the court then proceeded to chide the Bureau for honestly acknowledging that Kaiser has an interest in the land exchange as well. *National Parks*, 606 F.3d at 1072. The court took the agency to task for "requir[ing] that Kaiser's private needs be met" and excluding alternatives that failed to meet Kaiser's private objectives. *Id.*

That is wrong. An agency's purpose and need statement cannot be invalid simply because it considered public and private objectives and then "define[d] goals for its action that fall somewhere

within the range of reasonable choices," as the Bureau did in this case. *See Burlington*, 938 F.2d at 196. This is especially so given the ramifications to an agency if it does not disclose private, non-federal objectives. As Judge Trott observed: "[o]f course there is a private purpose driving this project. But the project benefits *both* parties, not just Kaiser. To isolate one without factoring in the other is patently illogical." *National Parks*, 606 F.3d at 1078 (Trott, J., dissenting).

The majority in *National Parks* also expressed concern that most of the alternatives considered by BLM would result in Kaiser acquiring federal land. *See National Parks*, 606 F.3d at 1072 (majority opinion) (listing alternatives and observing that "[a]ll of these options, save the No Action alternative, would result in landfill development of some sort and would require some portion of the land exchange to occur"). It ruled that BLM arbitrarily excluded the consideration of a landfill on other Kaiser property. *See id.*

The majority opinion, however, conflicts with *Burlington* because agencies are not required to "canvass the business choices" faced by a private entity that has chosen to pursue a project. *Burlington*, 938 F.2d at 197 n.7. If this view applied in the D.C. Circuit, the FAA in *Burlington* would have been required to analyze the alternative of Burlington Air Express building a cargo hub somewhere else besides Toledo. But this view was explicitly rejected by the D.C. Circuit in *Burlington*. *See id.* at 198-99.

In addition, while the Bureau considered six alternatives in *National Parks* compared to FAA's consideration of only two alternatives in *Burlington*, the majority chastised the agency for failing to

consider "several alternatives that would have been responsive to the need to meet long-term landfill demand, such as a landfill on other Kaiser property, waste diversion, offsite landfill locations, landfill mining, alternative Townsite locations, and alternative Townsite uses." *National Parks*, 606 F.3d at 1072. The court's list of alternatives, however, has no discernable limit and contradicts *Burlington*'s holding that agencies may include "goals of an action [that] delimit the universe of the action's reasonable alternatives." *Burlington*, 938 F.2d at 195. *See also City of Alexandria*, 198 F.3d at 867 ("[A]n alternative is properly excluded from consideration in an environmental impact statement only if it would be reasonable for the agency to conclude that the alternative does not 'bring about the ends of the federal action.'") (quoting *Burlington*, 938 F.2d at 195).

Indeed, the Ninth Circuit impermissibly focused on the general goal "to meet long-term landfill demand," *National Parks*, 606 F.3d at 1071, divorced from "the application at issue" and "the goals of the applicant's proposal." *Burlington*, 938 F.2d at 199.[2]

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[2] The Ninth Circuit's decision prohibiting agencies from "exclud[ing] alternatives that fail to meet specific private objectives," *National Parks*, 606 F.3d at 1072, is a departure from its prior recognition that an agency's purpose and need statement may address a a non-federal applicant's needs. *See City of Angoon v. Hodel*, 803 F.2d 1016, 1021-22 (9th Cir. 1986) (*per curiam*) (holding that to preclude an agency from considering a non-federal applicant's needs "is to visit upon it a task that would involve almost endless speculation). The majority in *National Parks* attempted to distinguish *Angoon*, noting that the issue in *Angoon* "was whether the Corps should issue a permit," as opposed to land exchange at issue in *National Parks*. *National Parks* 606 F.3d at 1071. But the Ninth Circuit's analysis in *Angoon* was actually (continued...)

This is the functional equivalent of the rule in the Seventh Circuit that "the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals." *Van Abbema*, 807 F.2d at 638.

The *Van Abbema* rule requires courts to invalidate purpose and need statements which contain private, non-federal objectives and allow agencies to consider alternatives which reflect a mix of public and private goals. Thus, the Seventh Circuit in *Simmons* invalidated a purpose and need statement because it did not articulate the general goal of water supply for Illinois residents and instead referenced the *specific* goal of a single reservoir for two localities—the single reservoir had been proposed to the Army Corps of Engineers by non-federal applicants as the means by which to accomplish the general goal of water supply for the residents. *See Simmons*, 120 F.3d at 667. Following *Van Abbema*, the court in *Simmons* forced the Corps to consider two or more sources of water instead of a single reservoir, holding that an agency "cannot restrict its analysis to those 'alternative means by which a particular applicant can reach his goals.'" *Id.* at 669 (quoting *Van Abbema*, 807 F.2d at 638 and contrasting *Burlington*, 938 F.2d at 198-99). *See also Hoosier Environmental Council, Inc. v. U.S. Army Corps of Engineers*, 105 F. Supp. 2d 953, 1000 n.23 (S.D. Ind. 2000) ("In [*Simmons*], the court noted

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[2] (...continued)
based on the Corps' purpose and need statement and not on the fact that the validity of a permit was ultimately at issue. *See Angon*, 803 F.3d at 1021.

[*Burlington's*] disagreement with its interpretation of the proper scope of relevant alternatives, but continued to apply the *Van Abbema* formulation."). *Compare National Parks*, 606 F.3d at 1072 ("The BLM may not . . . adopt[] private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives.") *with Simmons*, 120 F.3d at 669.

But the *Van Abbema* rule is not followed in the D.C. Circuit or Tenth Circuit because it is premised on "critical flaws." *See Burlington*, 938 F.2d at 199. *See also Dombeck*, 185 F.3d at 1174 (declining plaintiffs' request to adopt *Van Abbema* rule).

Van Abbema's "assertion that an agency must evaluate 'alternative means to accomplish the general goal of an action'" likewise "trouble[d]" the D.C. Circuit in *Burlington*. *Burlington*, at 199 (quoting *Van Abbema*, 807 F.2d at 638). As the D.C. Circuit noted,

> [l]eft unanswered in *Van Abbema* . . . is why and how to distinguish general goals from specific ones and just who does the distinguishing. *Someone* has to define the purpose of the agency action. Implicit in *Van Abbema* is that the body responsible is the reviewing court . . . . [H]owever, NEPA and binding case law provide otherwise.

Burlington, 938 F.2d at 199.

In this case, the Bureau defined the purpose of the land exchange in a manner that reflected a mix of public and private goals, similar to the purpose and need statements in *Burlington* and *Dombeck*. *See National Parks*, 606 F.3d at 1071 (discussing four goals

in Bureau's purpose and need statement).[3] Yet the Ninth Circuit rejected the deferential approach to agency decision-making under NEPA in favor of a standard which limits agencies to consideration of only general goals. This "general goals" standard is an ambiguous concept that forecloses an agency's ability to respond to a proposal that "arouses the call for action" and thereby establishes goals which "delimit the universe of the action's reasonable alternatives." *Burlington*, 938 F.2d at 195, 199. It also stands in sharp contrast to the Council on Environmental Quality's own guidance regarding NEPA regulations. *See* 48 Fed. Reg. 34,263, 34,267 (July 28, 1983) ("There is . . . no need to disregard the applicant's purposes and needs and common sense realities of a given situation in the development of alternatives.").

More importantly, *National Parks* conflicts with D.C. Circuit and Tenth Circuit precedent, leaves public and private parties uncertain "in a setting where a private entity approaches a governmental entity with a joint proposal that will benefit both," and should accordingly be reviewed by this Court. *See National Parks*, 606 F.3d at 1078 (Trott, J., dissenting).

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[3] The majority's mischaracterization of securing a "long-term income source" provided by the landfill as a private objective instead of a public goal underscores its failure to abide by the deferential role courts play in reviewing NEPA purpose and need statements. *See* Petitioners Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation's Petition for Writ of Certiorari at 27

II

THE ENDLESS ADMINISTRATIVE AND JUDICIAL HURDLES CREATED BY THE NINTH CIRCUIT'S DECISION ARE IMPORTANT TO FEDERAL AND NON-FEDERAL PARTIES THROUGHOUT THE COUNTRY AND WARRANT REVIEW

The Ninth Circuit halted a landfill project that would have addressed "a 'critical' landfill capacity shortfall in Southern California. *National Parks*, 606 F.3d at 1079 (Trott, J., dissenting) (citing administrative record). But Kaiser's project would not only have benefitted Californian residents–the landfill would also have been the first to comply with new Environmental Protection Agency guidelines and could have become "'one of the world's safest landfills and a model for others to emulate.'" *Id.* at 1075, 1077-78 (quoting Technical Advisory Panel composed of eminent scientists and engineers from major California Universities) (emphasis in dissent omitted). In addition, the land given up by Kaiser under the land exchange would have enhanced contiguous federal land in Southern California that protects endangered and threatened species. *See id.* at 1082-84 (citing administrative record).

Despite Kaiser's cooperation with state and federal agencies for nearly two decades in order to achieve these laudable goals, the project's status remains uncertain. *See* Petitioners Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation's Petition for Writ of Certiorari at 32-35. The Ninth Circuit has remanded the case to the Bureau "to do something BLM has already adequately done: consider the value of the land involved as a commercial

landfill," sending the parties "back to a Sisyphean hill which cannot be climbed in a lifetime," *National Parks*, 606 F.3d at 1075, 1078 (Trott, J., dissenting). The delay in this case has already cost Kaiser millions of dollars and speaks ill of the administrative and judicial processes. *See id.* at 1076 (noting that Kaiser's "vain attempt to accomplish its goals" has cost it more than $50,000,000). As Judge Trott asked, "[h]ow many of the people who started this project are still employed by Kaiser, are still in public service, or for that matter, are still alive? Yet, the *process* has developed an eternal life of its own as full-employment for all swept along with or by it." *Id.* at 1078.

The significance of leaving the panel majority's opinion in place is best summarized in the opening lines of Judge Trott's dissent: "What sane person would want to attempt to acquire property for a landfill? Our well-meaning environmental laws have unintentionally made such an endeavor a fool's errand." *National Parks*, 606 F.3d at 1075 (Trott, J., dissenting).

Judge Trott's points are appropriate and relevant to Kaiser and all private entities that wish to work cooperatively with federal agencies. *Cf. id.* at 1082 ("Of course Kaiser has its own goals it hopes to accomplish from this project, and of course it hopes to make profit, but it seems blindingly apparent that its goals dovetail with the public's need for a landfill.") Navigating through the administrative state is difficult enough, especially when the voyage is fraught with the uncertain specter of litigation. At a certain point, however, the hurdles become too burdensome and a company will choose to go no further in the pursuit of a public objective. This Court's review of *National*

Parks is, therefore, necessary to ensure that the Ninth Circuit's decision does not lead to this disturbing consequence for projects throughout the country.

CONCLUSION

Review of *National Parks* is warranted because (in addition to the Seventh Circuit) the Ninth Circuit's decision conflicts with decisions from the D.C. Circuit and Tenth Circuit and leaves federal and non-federal parties uncertain in circumstances "where a private entity approaches a government entity with a joint proposal that will benefit both." *Id.* at 1078. If allowed to stand, *National Parks* is likely to lead regulated entities to grow "weary . . . and throw in the towel, thwarted and defeated not by substance, but by interminable process." *Id.* This is contrary to the public interest.

For these reasons, Amicus Pacific Legal Foundation urges this Court to grant the petition for a writ of certiorari.

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Respectfully submitted,

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